IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-40,339-09

EX PARTE BRIAN EDWARD DAVIS, Applicant

ON APPLICATION FOR WRIT OF HABEAS CORPUS IN CAUSE NO. 616522-I IN THE 230TH JUDICIAL DISTRICT COURT HARRIS COUNTY

Per curiam. Newell, J., not participating.

O R D E R

This is a subsequent application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071.[1] In 1992, a jury convicted applicant of the offense of capital murder. The jury answered the special issues submitted under Article 37.071, and the trial court, accordingly, set punishment at death. Art. 37.071, § 2(g). This Court affirmed applicant's conviction and sentence on direct appeal. *See Davis v. State,* No. AP-71,513, published in part at 961 S.W.2d 156 (Tex. Crim. App. 1998).

[1] Unless otherwise indicated, all references to articles are to the Texas Code of Criminal Procedure.

Applicant filed his initial application for a writ of habeas corpus in the convicting court in 1997. This Court denied relief. *Ex parte Davis*, No. WR-40,339-01 (Tex. Crim. App. Mar. 10, 1999) (not designated for publication). Applicant later filed three more habeas applications which were all dismissed for failure to satisfy the requirements for a subsequent writ under Article 11.071, § 5. *See Ex parte Davis,* Nos. WR-40,339-02 (Tex. Crim. App. Sep. 13, 2000); WR-40,339-03 (Tex. Crim. App. Apr. 29, 2002); and WR-40,339-04 (Tex. Crim. App. May 7, 2002) (all not designated for publication).

Applicant filed a fifth habeas application raising an intellectual disability claim under *Atkins v. Virginia*, 536 U.S. 304 (2002). We found that applicant had satisfied the requirements of Article 11.071, § 5, and we remanded the intellectual-disability claim to the trial court for fact finding (at the time, the term "mental retardation" was used). *Ex parte Davis*, No. WR-40,339-05 (Tex. Crim. App. Aug. 9, 2002) (not designated for publication). The trial court held an evidentiary hearing in November 2004 concerning applicant's *Atkins* claim. Applicant presented expert testimony from two witnesses and the State presented expert testimony from one witness, Dr. George Denkowski.[2] The trial court signed findings

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[2] In the years since Denkowski testified at applicant's 2004 hearing, problems have come to light regarding pervasive errors in Denkowski's administration and scoring of IQ and adaptive-deficit tests. *See, e.g., Matamoros v. Stephens*, 539 Fed. Appx. 487, 493 (5th Cir. 2013); *Ex parte Butler*, 416 S.W.3d 863, 863-64 (Tex. Crim. App. 2012). In 2011, Denkowski entered into a settlement agreement with the Texas State Board of Examiners of Psychologists, in which his license was "reprimanded" and he "agreed to not accept any engagement to perform forensic psychological services in the evaluation of subjects for mental retardation or intellectual disability in criminal proceedings." *Id*. Further, the record in applicant's case reveals errors in Denkowski's IQ testing of applicant. Thus, we do not consider Denkowski's testimony, statements, or test results in our analysis of applicant's present *Atkins* claim.

of fact and conclusions of law in 2005 recommending that this Court deny applicant relief. The trial court utilized the definition of mental retardation in Texas Health and Safety Code § 591.003 and the guidelines this Court set out in *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004).

In 2006, this Court adopted the trial court's findings and conclusions and denied relief on applicant's first *Atkins* claim. *Ex parte Davis,* No. WR-40,339-05 (Tex. Crim. App. Mar. 29, 2006) (not designated for publication). However, we subsequently granted applicant a retrial on punishment following his -06 application alleging that the nullification instruction in the court's charge did not allow the jury to consider and give effect to his mitigating evidence. *See Ex parte Davis,* No. AP-76,263 (Tex. Crim. App. Nov. 18, 2009) (not designated for publication).

At applicant's 2011 punishment retrial, his attorney did not ask the jury to find applicant intellectually disabled and instead argued that applicant "has a very diminished mental capacity." Applicant's expert, Dr. Gilda Kessner, who had testified in 2004 that applicant was "mentally retarded," re-tested applicant resulting in an IQ score of 83. At the 2011 retrial, Kessner—contrary to her prior testimony—testified that applicant was "on the cusp of low average and borderline intellectual functioning." Applicant again received the death penalty and we affirmed applicant's death sentence on direct appeal. *Davis v. State,* No. AP-76,521 (Tex. Crim. App. Oct. 23, 2013) (not designated for publication). Applicant then filed his -07 and -08 habeas applications, which we denied and dismissed. *See Ex parte*

Davis, Nos. WR-40,339-07 and -08 (Tex. Crim. App. May 25, 2016) (not designated for publication). The -07 application included a renewed *Atkins* claim. *See id.,* No. WR-40,339-07 (Alcala, J., concurring).

Applicant filed the instant -09 application in the trial court on May 16, 2017. The trial court forwarded it to this Court in compliance with Article 11.071, § 5. In December 2017, we held that applicant failed to make a prima facie showing that he met the requirements of either Article 11.073 or Article 11.071, § 5 regarding his first, second, third, and fifth allegations. *Ex parte Davis*, No. WR-40,339-09, slip op. at 3-4 (Tex. Crim. App. Dec. 6, 2017) (not designated for publication). Applicant alleged in his fourth allegation that he is intellectually disabled and ineligible for the death penalty under *Atkins*. He invoked as new authority the Supreme Court's 2017 *Moore v. Texas* decision, in which the Court rejected the use of the *Briseno* factors because "they creat[e] an unacceptable risk that persons with intellectual disability will be executed." 137 S. Ct. 1039, 1051 (2017) (*Moore I*).

We found that, in order for this Court to determine whether applicant's fourth allegation satisfies an exception to Article 11.071, § 5, and, if so, whether applicant is intellectually disabled, further fact-finding was necessary. *Davis*, No. WR-40,339-09, slip op. at 4. We remanded applicant's claim to the habeas court to develop evidence and make a recommendation to this Court. *Id.* We ordered the habeas court to first make findings of fact and conclusions of law regarding whether applicant satisfies any exception to the procedural bar of Article 11.071, § 5. *Id.* And, if the habeas court determined that applicant's fourth

claim was not procedurally barred, we directed the court to consider whether applicant is intellectually disabled. *Id.* We noted that, in making this determination, the habeas court could receive additional evidence. We directed the habeas court to consider all of the evidence presented in light of the Supreme Court's *Moore I* opinion. *Id.* We ordered the habeas court to make findings of fact and conclusions of law on the issue of intellectual disability and any other issue the court determined was pertinent to the resolution of the fourth allegation. *Id.*

In June 2019, the trial court adopted the State's proposed findings of fact and conclusions of law recommending that this Court dismiss applicant's fourth allegation as an abuse of the writ under Article 11.071, § 5. The trial court noted that applicant did not present any new evidence in his -09 writ application to support his intellectual disability claim. The trial court found that the Supreme Court's opinion in *Moore I* was merely "an extension of" the Supreme Court's 2014 decision in *Hall v. Florida*, 572 U.S. 701 (2014). The trial court stated that applicant's intellectual disability claim "was recognized by, and could have been reasonably formulated from," the *Hall* decision and its progeny in 2015. The trial court relied on *Ex parte Moore*, 548 S.W.3d 552 (Tex. Crim. App. 2018). However, the court did not address the Supreme Court's February 2019 reversal of *Ex parte Moore*. *See Moore v. Texas*, 139 S. Ct. 666, 667 (2019) (*Moore II*).

We have previously found *Moore I* to constitute a new legal basis under Article 11.071, § 5. We decline to adopt the trial court's findings of fact and conclusions of law and assume

our role as the ultimate fact finder in this case. *Cf. Ex parte Flores*, 387 S.W.3d 626, 634-35 (Tex. Crim. App. 2012). We have reviewed all the evidence in the writ record, applicant's filings, and the relevant portions of the direct appeal records. Based on our own review of the record, we find that applicant has not made an adequate prima facie showing regarding his claim of intellectual disability. Having previously determined that applicant failed to make a prima facie showing on his first, second, third, and fifth allegations, we now hold that he has failed to satisfy the requirements for a subsequent writ under Article 11.071, § 5. We dismiss his subsequent application as an abuse of the writ. *See* Art. 11.071, § 5(c).[3]

IT IS SO ORDERED THIS THE 1ST DAY OF APRIL, 2020.

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[3] We also take no action on applicant's suggestion that we reconsider our disposition of his second claim in this application.